

December 4, 2017

**VIA ECFS**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street S.W.  
Room TWA325  
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentations  
CG Docket No. 02-278**

Dear Ms. Dortch:

On November 30, 2017, Mark W. Brennan and Arpan A. Sura of Hogan Lovells US LLP, counsel to the American Association of Healthcare Administrative Management; Mike Merola and Michael McMenamin of Winning Strategies Washington; Vincent Frakes of WellCare Health Plans, Inc; Jack Young and Adam Goldberg of Anthem, Inc; and Adam Peltzman of Blue Cross Blue Shield Association held separate meetings with the following individuals from the Federal Communications Commission ("FCC" or "Commission"):

- Zenji Nakazawa, Legal Advisor, Public Safety and Consumer Protection, for Chairman Pai;
- Amy Bender, Legal Advisor, Wireline, for Commissioner O'Rielly;
- David Grossman, Chief of Staff and Media Policy Advisor for Commissioner Clyburn;
- Nirali Patel, Acting Legal Advisor, Media, Consumer Protection, and Enforcement, for Commissioner Carr;
- Travis Litman, Chief of Staff and Senior Legal Advisor to Commissioner Rosenworcel; and
- Kristi Thornton, Associate Division Chief, Policy Division, Consumer and Governmental Affairs Bureau ("Bureau"); Christina Clearwater, Attorney Advisor for the Bureau; and Lauren Wilson, Attorney Advisor for the Bureau.

During these meetings, we discussed the pending Joint Petition,<sup>1</sup> which seeks two clarifications regarding healthcare-related communications under the Telephone Consumer Protection Act ("TCPA") and the FCC's *2015 Omnibus TCPA Order*.<sup>2</sup>

1. That the provision of a phone number to a "covered entity" or "business associate" (as those terms are defined under Health Insurance Portability and Accountability Act of 1996 ("HIPAA")) constitutes prior express consent for non-telemarketing calls allowed under HIPAA for the purposes of treatment, payment, or health care operations.

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<sup>1</sup> See Joint Petition of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management for Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus Declaratory Ruling and Order, CG Docket No. 02-278 (filed July 28, 2016) ("Joint Petition").

<sup>2</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 et al.*, Declaratory Ruling and Order, 30 FCC Rcd 7961 (2015) ("*2015 Omnibus TCPA Order*").

2. That the prior express consent clarification in paragraph 141 and the non-telemarketing health care message exemption granted in paragraph 147, both in the *2015 Omnibus TCPA Order*, be clarified to include HIPAA “covered entities” and “business associates.” Specifically, each use of the term “healthcare provider” in paragraphs 141 and 147 of the *2015 Omnibus TCPA Order* should be clarified to encompass “HIPAA covered entities and business associates.”

During the meetings, we discussed two recent, bipartisan letters of support from members of both Chambers of Congress. On October 13, 2017, a bipartisan group of members of the House of Representatives led by Representatives Bilirakis and Cardenas sent a letter (attached) asking Chairman Pai to act promptly to “afford clarity to covered entities and business associates making non-marketing communications that benefit patients.”<sup>3</sup> As this bipartisan coalition observed, “helpful, important non-marketing communications can be critical safeguards to reaching underserved populations and supporting more effective, efficient health care.”<sup>4</sup>

Senators Booker and Nelson also sent a bipartisan letter (also attached) to Chairman Pai on November 3, 2017. They noted that the calls and text messages subject to the Joint Petition convey “important medical and treatment information” and “improve patient outcomes.”<sup>5</sup> They also stated that “time is of the essence to ensure that consumers’ access to health care is not jeopardized” and asked the FCC to “resolve these issues as soon as possible (preferably within the next 90 days) and to protect communications allowed under HIPAA in light of their unique value to consumers and their positive impact on Americans’ health and well-being.”<sup>6</sup>

As we noted during the meetings, the strong bipartisan Congressional support for the goals of the Joint Petition mirrors the near-unanimous support in the record.<sup>7</sup> An array of diverse stakeholders has urged the Commission to expeditiously grant the Joint Petition and confirm that HIPAA-regulated entities may place calls and texts that help patients and improve healthcare outcomes. These communications include, for example, onboarding, wellness, informational, and follow-up and calls and texts that:<sup>8</sup>

- Explain coverage and how to get needed care;
- Perform health screenings and identify at-risk members;
- Answer questions and ensure that members have access to care;
- Facilitate selection of primary care provider and schedule appointments;
- Remind members to get preventive care, such as shots;
- Manage chronic conditions and enroll members in care/disease management programs;

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<sup>3</sup> See Letter from Rep. Gus Bilirakis, *et al.* to FCC Chairman Ajit Pai, at 1 (Oct. 13, 2017) (attached).

<sup>4</sup> *Id.* at 2.

<sup>5</sup> See Letter from Sens. Corey Booker and Bill Nelson to FCC Chairman Ajit Pai, at 1 (Nov. 3, 2017) (attached).

<sup>6</sup> *Id.*

<sup>7</sup> See Reply Comments in Support of Joint Petition of Anthem, Inc., Blue Cross Blue Shield Association, WellCare Health Plans, Inc., and the American Association of Healthcare Administrative Management for Expedited Declaratory Ruling and/or Clarification of the 2015 TCPA Omnibus Declaratory Ruling and Order, CG Docket No. 02-278, at 3 (filed Oct. 4, 2016) (“The vast majority of comments (45 of 46) have been in support of the proposed clarification, and added to the substantial record demonstrating the value of these communications to critical public health goals.”).

<sup>8</sup> See Telephone Member Outreach (attached).

- Educate members about proper emergency room utilization;
- Facilitate transitions of care;
- Help ensure that members are filling and taking medications appropriately;
- Solicit member feedback and ensure satisfaction;
- Obtain new contact information;
- Update members about benefits and/or network changes;
- Share details about plan features and programs; and
- Remind members about renewing their benefits

During the meetings, we explained that patients need and expect these and other non-marketing treatment, payment, and operations calls and texts, irrespective of which party in the HIPAA ecosystem—physicians, health plans, clearinghouses, or business associates—places the communication or obtains the patient’s telephone number in the first instance. Federal and state regulators also expect HIPAA-governed entities to place calls and texts related to treatment, payment, and operations.<sup>9</sup> The Centers for Medicare and Medicaid Services (“CMS”), for example, has developed and oversees a number of patient healthcare experience surveys that are administered by HIPAA-regulated covered entities and business associates,<sup>10</sup> including the Consumer Assessment of Healthcare Providers and Systems (“CAHPS”) surveys that are designed to assess patient experience and care quality in a particular healthcare setting.<sup>11</sup> Consistent with patients’ and regulators’ expectations, HIPAA permits non-marketing communications related to treatment, payment, and operations while strictly regulating the circumstances under which they can be made.<sup>12</sup> Moreover, there is copious empirical evidence in the record that these non-marketing communications improve health outcomes and expand access to coverage.<sup>13</sup>

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We urge the FCC to grant the Joint Petition expeditiously and remove the uncertainty created by the *2015 Omnibus TCPA Order* that has chilled healthcare-related communications. Doing so would support a critical public policy goal of providing effective and efficient medical care, especially to at-risk populations. Granting the Joint Petition would also support the Commission’s longstanding policy of harmonizing HIPAA and the TCPA.<sup>14</sup>

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<sup>9</sup> See, e.g., Letter from Michael McMenamin, Principal, Winning Strategies Washington, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278, at 2 (filed May 25, 2017).

<sup>10</sup> See CMS, *Consumer Assessment of Healthcare Providers & Systems (CAHPS)*, <http://go.cms.gov/2qgJf9Y> (last visited Dec. 1, 2017).

<sup>11</sup> See AHRQ, *CAHPS: Surveys and Tools to Advance Patient-Centered Care*, <http://bit.ly/2ekNN5i> (last visited Dec. 1, 2017).

<sup>12</sup> See, e.g., Attachment to *Ex Parte* Letter from Blue Cross Blue Shield Association to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-278 (filed Aug. 9, 2017).

<sup>13</sup> See Joint Petition at 5-11 (collecting research studies).

<sup>14</sup> See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830, 1831 ¶ 187 (2012).

December 4, 2017

In accordance with Section 1.1206(b)(2) of the Commission's rules, this letter is being filed electronically with your office. Please contact me with any questions in connection with this filing.

Respectfully submitted,

/s/ Mark W. Brennan

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